Supreme Court, U.S.
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No. 96-1476

In The

Supreme Court of the United States

October Term, 1996

ALLSTATE LIFE INSURANCE COMPANY,

Petitioner,

v.

MICHAEL HIBMA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Arizona

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents, Prescott Glass Corporation, Michael Hibma, Robert Hibma, and Sharon Hibma, on their own behalf and as guardians of Michael Hibma, a minor, request that this Court deny the petition for writ of certiorari seeking review of an unpublished order of the Arizona Court of Appeals entered March 14, 1996 and supplemented on May 21, 1996.

STATEMENT OF THE CASE

Respondents respectfully oppose the petition for writ of certiorari because the order for which review is sought is an unpublished memorandum decision and is binding only on the parties thereto, *i.e.*, Allstate and the Hibmas.

A. Procedural History

Respondents own a one-employee business in Prescott, Arizona. They arranged for group health insurance for the family and the one employee from Allstate Insurance Company. In 1988, the Hibmas' son, Michael, was permanently and severely injured in an accident. In 1989, Allstate terminated coverage of the Hibmas. The Hibmas sued Allstate in Arizona Superior Court for breach of contract and bad faith. Allstate contends that this is an ERISA case and, hence, is preempted. The family contends that this is a state common law matter. Allstate moved for summary judgment, which was denied by the trial court. The Arizona Court of Appeals affirmed in an unpublished opinion "because that question turns on an unresolved question of fact." (Appendix to Petition for Writ of Certiorari, 7a). Before appeal, the parties entered into a high-low agreement whereby Allstate was to pay the Hibmas the low figure if the case was governed by ERISA and the high figure if governed by state law. A condition of payment for the high figure was that the ERISA issue had to be decided "on the merits." Because it was unclear from the first Court of Appeals opinion whether the ERISA issue

was decided "on the merits," both parties requested clarification and the court issued a supplemental memorandum opinion. Resolving any questions of fact in Allstate's favor, the Court of Appeals decided the ERISA issue on the merits and in the Hibmas' favor. It opined:

> We now decide the issue on the merits. We conclude under the circumstances of this case, even assuming that Prescott Glass paid all or part of the premiums for Hull [Prescott Glass' sole employee, other than the Hibmas], ERISA does not apply. . . .
>
> * * *
>
> On the record as it most strongly favors Allstate in this case, we can say that the regulatory concerns of ERISA are not implicated.

Appendix to Petition for Certiorari, 2a-4a.

The Court of Appeals also noted, cumulatively, that the employer's role was "so negligible, so lacking in anything meaningful to the enforcement of ERISA policy, that preemption does not apply in this case." (Appendix to Petition for Certiorari, 12a).

The Arizona Supreme Court denied Allstate's petition for review.

B. Correction of Misstatements in the Petition

1. Introduction

Petitioner's introduction overstates the Arizona Court of Appeals' holding. The court simply held that ERISA does not apply "under the circumstances of this case." (Appendix to Petition for Writ of Certiorari, 2a). The appellate decision does not contain the broad language stated in the first sentence of the Petition's introduction. In addition, Allstate's statement that "[t]he ruling, moreover, was not confined to small or medium-sized employers; it applies across the board to all employers" is also incorrect. The ruling was confined to this particular employer and Allstate.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS AN UNPUBLISHED STATE COURT MEMORANDUM DECISION AND IS NOT BINDING ON ANYONE EXCEPT ALLSTATE AND THE HIBMAS.

The Arizona Rules of Civil Appellate Procedure provide that memorandum decisions are not regarded as precedent and they are not to be cited except to establish a *res judicata* defense, collateral estoppel, or law of the case. Ariz. R. Civ. App. P. 28(c); *First Interstate Bank v. Dep't of Revenue*, 916 P.2d 1149, 1153 (Ariz. Ct. App. 1995), *review denied*, (stating that citing an unpublished decision is improper and declining to consider the decision); *Asarco, Inc. v. Industrial Comm'n*, 594 P.2d 107, 110 (Ariz. Ct. App. 1979), *appeal after remand*, 619 P.2d 27 (holding that memoranda decisions should not be cited as authority).

Further, it is highly unlikely that the result in Hibma would even occur again given its unique set of facts.

II.

THE UNPUBLISHED MEMORANDUM DECISION WILL NOT CREATE CONFUSION IN ARIZONA OR OTHERWISE.

Arizona courts will not consider the unpublished decision as precedent. *First Interstate Bank*, 916 P.2d at 1153; *Asarco*, 594 P.2d at 110. Other states will not consider an unpublished Arizona decision as precedent, first, because they will not have access to it, and, secondly, because state court decisions are not binding precedent on other states. *Morrison v. Burlington Industries*, 282 S.E.2d 458, 470 (N.C. 1981). Therefore, Petitioner's claim that review is necessary to resolve confusion created by the unpublished opinion is unfounded.

III.

THE UNPUBLISHED STATE COURT MEMORANDUM DECISION WILL NOT CREATE CONFLICT AMONG THE FEDERAL CIRCUITS.

Federal courts are not required to follow state precedent unless it is published. *Harnischfeger Corp. v. Harbor Ins. Co.*, 927 F.2d 974, 976 (7th Cir. 1991), *rehearing denied, cert. denied*, 112 S. Ct. 189, 502 U.S. 864, 116 L. Ed. 2d 150. Moreover, the Ninth Circuit does not consider its own unpublished opinions as precedent. *People of Territory of Guam v. Yang*, 850 F.2d 507, 511 (9th Cir. 1988). If the Ninth Circuit will not rely on its own unpublished opinion, it is highly unlikely it will consider an unpublished *state court* opinion.

IV.

REVIEW OF THE UNPUBLISHED DECISION WILL NOT END PERCEIVED CONFLICT IN ERISA'S PLAN COVERAGE.

The decisions cited as evidence of a conflict are misleading, as is Petitioner's statement that "Arizona is one of the many states" expressing dissatisfaction with ERISA. Petitioner cites cases from seven states. Seven out of fifty hardly constitutes a majority. Additionally, Petitioner notes that the state decisions are contrary to the "law in the majority of the circuits." The conflict, if any, between state court decisions and the circuit law could have been resolved on earlier petitions for certiorari; however, this Court chose not to grant certiorari. *Turnbow v. Pacific Mut. Life Ins. Co.*, 765 P.2d 1160 (Nev. 1988), *cert. denied*, 490 U.S. 1102 (1989); *Blue Cross/Blue Shield of Florida, Inc. v. Weiner*, 543 So.2d 794 (Fla. Ct. App. 1989), *review denied*, 553 So.2d 1164, *cert. denied*, 494 U.S. 1028 (1990), *aff'd by abstention in collateral proceeding*, 730 F. Supp. 674 (D. Md. 1990), *aff'd*, 925 F.2d 81 (4th Cir. 1991), *cert. denied*, 502 U.S. 816 (1991); *Sayble v. Blue Cross of Southern Calif.*, 256 Cal. Rptr. 820 (1989), *overruled by Marshall v. Bankers Life & Cas. Ins. Co.*, 2 Cal. 4th 1045, 10 Cal. Rptr. 2d 72, *cert. denied*, 506 U.S. 1000 (1992). Any conflict in how courts are determining the existence of an ERISA plan would have been apparent in the difference between *Weiner* and *Marshall*. Yet, the Court declined review of both cases.

V.

THE UNPUBLISHED ARIZONA DECISION DETERMINES NO FEDERAL QUESTIONS, BUT RATHER ENDS LITIGATION BETWEEN TWO PARTIES.

Petitioner argues that unless the unpublished Arizona decision is reversed, it will have "a significant adverse impact on (literally) millions of insured employee benefit plans across the country." This statement is untrue. The only significant adverse impact of this unpublished decision is on Allstate's pocketbook. The "practical effect" of the decision is not to "void ERISA's carefully crafted . . . enforcement schemes," but rather, to force Allstate to honor its settlement agreement with the Hibmas. As the Arizona Court of Appeals put it: "The order of the trial court is affirmed, and under the terms of the agreement entered into between the parties, the Hibmas are entitled to payment of the greater amount called for by the agreement." (Appendix to Petition for Writ of Certiorari, 4a).

This Court has already provided guidance to employers, participants, beneficiaries, and administrators on the necessary elements for ERISA coverage. *See Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 (1986). No further guidance from this Court is needed, especially on a case with a unique factual background which formed the basis of the settlement agreement between the parties.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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